UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	No. 1:16-cr-062
-v-	HONORABLE PAUL L. MALONEY
ANTONIO RAMON MARTINEZ-LOPEZ ET AL., Defendants.	

CRIMINAL CONTEMPT ORDER

This matter comes before the Court in a troubling posture: Gustavo Ramiro Acuna-Rosa, a defendant in the charged conspiracy was issued a valid subpoena, ordered to testify before the jury at a pending trial,[1] and refused to do so without a valid reason. Acuna-Rosa's contempt, therefore, is laid bare and must be punished.

Over the course of the past year, Acuna-Rosa entered into a plea agreement (ECF No. 78), pled guilty (ECF Nos 80–83), and was sentenced to twenty-six (concurrent) months in custody on Counts 1 and 2 and three years of supervised release (ECF No. 181–82). As a part of the Agreement, Acuna-Rosa agreed to fully cooperate with the United States in its criminal investigation and prosecution. (ECF No. 78 at PageID.192.) In addition, the United States "agree[d] not to bring additional criminal charges against" Acuna-Rosa, so long as the

[1] All relevant proceedings were held outside of the presence of the jury so as to not prejudice the remaining defendants.

relevant conduct was disclosed prior to the date of the Agreement. (*Id.* at PageID.193–94.)[2] Up until now, Acuna-Rosa has cooperated. (*See, e.g.*, ECF No. 179.)

Puzzlingly, Acuna-Rosa had a late-breaking change of heart.

Acuna-Rosa had been subpoenaed to testify at a jury trial against the remaining defendants today, and he appeared with counsel. A sworn interpreter provided translation from English into Spanish and Spanish into English. Acuna-Rosa was sworn in under oath. Acuna-Rosa informed the Court that he did not wish to testify.

The United States, through questioning, asked why Acuna-Rosa refused to testify, but Acuna-Rosa refused to provide any explanation. Through questioning, Acuna-Rosa also understood that he had entered into a plea agreement to cooperate that could be in jeopardy if the United States sought revocation of the Agreement.

The United States then made a motion to compel Acuna-Rosa to testify, and presented a proposed order compelling such testimony. The application was signed by an appropriate official, included supporting documentation, and met all necessary requirements to ensure use- and derivative-use immunity, *see, e.g.*, 18 U.S.C. § 6001 *et seq.*; accordingly, the Court signed the order. (ECF No. 261 at PageID.1129.)

The Court advised Acuna-Rosa that his failure to obey a direct order would subject him to additional criminal penalties, including a term of imprisonment that would not count as credit for his underlying sentence.

[2] Presumably for this reason, the fact that Acuna-Rosa was already sentenced, *cf. Mitchell v. United States*, 526 U.S. 314, 326 (1999), and the fact that the United States had procured an order under 18 U.S.C. § 6003 (*see* ECF No. 262 at PageID.1132), Acuna-Rosa never attempted to invoke the Fifth Amendment.

Acuna-Rosa indicated he fully understood what was being ordered. The Court also gave Acuna-Rosa fifteen minutes to discuss the risks associated with failing to obey a direct order with his attorney. Acuna-Rosa's attorney indicated that a translator was used in his discussion. Acuna-Rosa still refused to testify in open court.

Thus, the Court summarily found Acuna-Rosa in direct criminal contempt of court. *See* Fed. R. Crim. P. 42(b) advisory committee's note ("Rule 42(b) has been amended to make it clear that a court may summarily punish a person for committing contempt in the court's presence without regard to whether other rules, such as Rule 32 (sentencing procedures), might otherwise apply.").

Thereafter, Acuna-Rosa was given another attempt to address the Court, but refused further comment.

This order confirms the criminal contempt finding, though the Court must correct the sentence.[3]

"Rule 42(b) of the Federal Rules of Criminal Procedure says that a court 'may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies.'" *United States v. Martin*, 241 F. App'x 979, 981 (6th Cir. 2007) (citing 18 U.S.C. § 401).

"The contempt power 'rests on the need to maintain order and a deliberative atmosphere in the courtroom,' and should be exercised when 'an open, serious threat to orderly procedure [requires] the instant and summary punishment . . . to fill the need for

[3] The Court announced on the record that it intended to sentence Acuna-Rosa to eighteen months; however, in the absence of a jury trial, the Court may not exceed a six-month sentence.

immediate penal vindication of the dignity of the court[.]'" *Id.* (quoting *Bloom v. Illinois*, 391 U.S. 194, 209–10 (1968) and *Harris v. United States*, 382 U.S. 162, 165 (1965)).

A four-part showing is necessary for a summary-contempt conviction: "(1) the defendant's conduct must constitute 'misbehavior,' (2) 'the misbehavior must amount to an obstruction of the administration of justice,' (3) the conduct must take place in the presence of the court and (4) the defendant must have the 'intent to obstruct.'" *Martin*, 251 F. App'x at 981 (quoting *In re Chandler*, 906 F.2d 248, 249 (6th Cir. 1990)); *see, e.g., Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 195 (9th Cir. 1979) ("Criminal contempt is established when there is a clear and definite order of the court, the contemnor knows of the order, and the contemnor willfully disobeys the order.")

The bottom line is this: Acuna-Rosa was given a direct order to testify in open court—and flatly refused, failing to offer any reason for his refusal. He had no valid reason to refuse to obey the Court's order. *See supra* note 3; *see also Kastigar v. United States*, 406 U.S. 441, 453 (1972) (finding that "use and derivative use" immunity under 18 U.S.C. § 6001 *et seq.* "is sufficient to compel testimony over a claim of the privilege").

The four elements for summary contempt clearly have been satisfied, *see* Martin, 251 F. App'x at 981, and Acuna-Rosa's misbehavior must be punished. Accordingly, for the reasons stated in this order and on the record, this Court hereby finds Gustavo Ramiro Acuna-Rosa in criminal contempt of court.

However, the Court must correct an error made on the record with the sentence it had intended to impose.

Congress has authorized federal courts to punish contempt "by fine or imprisonment, or both, at its discretion," 18 U.S.C. § 401, and has not prescribed a statutory sentencing range. *See United States v. Goldberg*, 8 F. App'x 391, 393 (6th Cir. 2001).

However, the Supreme Court has held that "[i]n the case of a summary-contempt conviction, the right to a jury trial protected by the Sixth Amendment limits the permissible sentence to six months" under these circumstances. *Martin*, 251 F. App'x at 983 (citing *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966)). Since this matter has not been referred for prosecution in a separate criminal contempt proceeding and jury trial, the Court may not impose an eighteen-month sentence.

This Court instead, therefore, sentences Gustavo Ramiro Acuna-Rosa to six months in prison for his criminal contempt, to be served immediately and consecutively to his underlying sentence. The Court certifies that in light of Acuna-Rosa's current incarceration, no different type of penalty would be sufficient to punish the contempt. The refusal to testify without explanation was brazen and in open court—and Acuna-Rosa refused to answer even basic questions with respect to why he refused to testify. This "willful and deliberate defiance," along with the "public interest," fully justify a six-month sentence; further, the sentence is necessary to "deter" any future witnesses, in this case or others, from refusing to testify as ordered without a valid justification, privilege, or even explanation. *See id.* (citing *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947)).

IT IS SO ORDERED.

Date: March 10, 2017

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge